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EDDIE BAUER, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KRISTAL D. SCHERER, an
individual, on behalf of herself
individually, all others similarly
situated, and on behalf of the general
pubic,

Plaintiffs,

v.

EDDIE BAUER, INC., a Delaware
corporation; and DOES 1 through
100, inclusive,

Defendants.

Case No. 07-CV-2270-JM-AJB

[Assigned to the Honorable Jeffrey T.
Miller]

**DEFENDANT EDDIE BAUER,
INC.'S NOTICE OF MOTION AND
PARTIAL MOTION TO DISMISS
PURSUANT TO FEDERAL RULE
OF CIVIL PROCEDURE 12(b)(6)**

[Declaration Of Kalia C. Petmecky
Filed Concurrently Herewith]

Date: January 18, 2008

Time: 1:30 p.m.

Courtroom: 16

Date Action Filed: Sept. 20, 2007

Date Action Removed: Dec. 3, 2007

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on January 11, 2007, at 1:30 p.m. in the Courtroom
3 of the Honorable Jeffrey T. Miller (Courtroom 16) located at 880 Front Street, Room
4 4290, San Diego, California 92101, Defendant Eddie Bauer, Inc. ("Eddie Bauer") will,
5 and hereby does, move the Court to dismiss with prejudice (1) the First Cause of Action
6 for alleged violations of California Labor Code § 221, and (2) Fourth Causes of Action
7 for alleged violations of California Business and Professions Code § 17200, in Plaintiff
8 Kristal D. Scherer's Complaint.

9 Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Eddie Bauer
10 moves to dismiss Plaintiff's claims on the grounds that Plaintiff has failed to state a
11 claim upon which relief can be granted pursuant to California Labor Code Section 221
12 and California Business and Professions Code Section 17200.

13 This Motion is based on this Notice of Motion and Motion, the accompanying
14 Memorandum of Points and Authorities, all papers and pleadings in the Court's file, any
15 other matter of which the Court may take judicial notice, and upon such oral argument
16 as may be presented to the Court at the time of the hearing on this matter.

17
18 Dated: December 10, 2007 **AKIN GUMP STRAUSS HAUER & FELD LLP**

19
20 By _____


Kalia C. Petmecky
Attorneys for Defendant
EDDIE BAUER, INC.

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MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Eddie Bauer, Inc. (“Eddie Bauer”) hereby moves to dismiss with prejudice the First Cause of Action for alleged violations of California Labor Code § 221, and Fourth Causes of Action for alleged violations of California Business and Professions Code § 17200, in Plaintiff Kristal D. Scherer’s Complaint (“Complaint”).

I. INTRODUCTION

Plaintiff’s Complaint asserting violations of Labor Code §221 based on the operation of certain employee incentive bonus plans (the Management Incentive Plan and the Team Incentive Plan), must be dismissed for failure to state a cause of action recognized by law. As the California Supreme Court recently held in *Prachasaisordej v. Ralphs Grocery Co., Inc.*, 42 Cal.4th 217 (2007), supplemental compensation based on an employee bonus incentive plan in which a “stated and expected wage was subject to an unanticipated contribution, deduction, withholding, and/or reimbursement to the employer for expenses beyond the employee’s control” does *not* violate Section 221 under the circumstances alleged herein.

In addition Plaintiff’s claims concerning the so-called Team Incentive Plan must be dismissed for a separate and independent reason. Plaintiff, who worked for Defendant only as a store manager, lacks standing to challenge Defendant’s Team Incentive Bonus Plan, because she fails to assert that such plan was ever or will ever be applied to her or that she was damaged in any way by such plan. Plaintiff’s pleadings asserting that she may represent a putative class of which she was never a member, are therefore fatally insufficient as a matter of law and must be dismissed.

Moreover, Plaintiff’s Section 17200 claim must also fail as it is entirely predicated on an alleged violation of Section 221.

II. PLAINTIFF’S ALLEGATIONS

For purposes of this Motion to dismiss only, Defendant relies on the following allegations in Plaintiff’s Complaint:

1 1. Defendant Eddie Bauer owns and operates a chain of retail clothing stores
2 throughout the United States, including stores in California. (Complaint, ¶ 6.)
3 Defendant also sells retail clothing through its mail order catalog. (Complaint, ¶¶ 6,
4 11.)

5 2. Plaintiff is a former full-time employee of Defendant, who worked for
6 Defendant from October 31, 2005 until June 2007, at a retail store in San Diego County.
7 (Complaint, ¶¶ 6, 20.)

8 3. Defendant adopted, implemented and enforced certain incentive plans
9 which provided store level employees with supplementary compensation over and
10 above the employees' stated hourly wages. (Complaint, ¶ 9.) *See also* SOP Incentive
11 Programs (attached as Exhibit B to Diane Kovac's Declaration in Support of
12 Defendant's previously filed Notice of Removal and also, for convenience, as Exhibit A
13 to Kalia Petmecky's Declaration in Support of this Motion) (collectively the "Incentive
14 Plans").¹ As evidenced by the plain language of the written plan document, the "Store
15 Management Incentive Program" applies to certain management employees, including
16 store managers. The referenced document also sets forth a second incentive program,
17 the "Store Team Incentive Program" that applies exclusively to non-management
18 employees. (Complaint, ¶ 9, Exhibit A.) Both Incentive Programs were in place during
19 Plaintiff's employment with Defendant. (Complaint, ¶ 9.)

20 4. Under the Store Management Incentive Plan, Scherer was eligible to
21 receive an incentive bonus (in addition to her hourly wages) if, among other things, the
22 monthly "dollar value of sales generated" at her particular store exceeded a pre-set and
23

24 ¹ This Court may consider the "SOP Incentive Programs" document, setting forth both the
25 "Store Management Incentive Plan" and the "Store Team Incentive Plan" without converting
26 Defendant's Motion to Dismiss into a Motion for Summary Judgment because Plaintiff's Complaint
27 expressly puts the contents of this document at issue (Complaint, ¶ 9). *Knievel v. ESPN*, 393 F.3d
28 1068, 1076 (9th Cir. 2005) (court did not err when it "deviate[d] from the general rule that courts,
when ruling on a motion to dismiss, must disregard facts that are not alleged on the face of the
complaint or contained in documents attached to the complaint" under the incorporation by reference
doctrine); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999) (holding "that it
was proper to consider the SEC filings under the incorporation by reference doctrine").

1 fluctuating monthly sales goal for that store. This pre-set amount, which fluctuated
2 from month to month and from store to store, was referred to as “Plan” under the
3 Incentive Programs. (Complaint, ¶ 9; Exhibit A.)

4 5. Store managers, such as Plaintiff, received a \$500 incentive in a month
5 when their stores achieved a pre-set targeted sales and hours performance level. *Id.* at
6 A-1, 2. Under the Management Incentive Program, managers also had an opportunity to
7 receive additional bonus payments where Plan was exceeded by certain incremental
8 amounts. *Id.*

9 6. Non-management employees at Defendant’s stores were eligible, under the
10 Store Team Incentive Program, for pre-set increases to their hourly rate when sales
11 reached pre-set targeted goals (“Plan”) within their store. (Exhibit A-1.) Under the
12 Store Team Incentive Program, non-management employees also had an opportunity to
13 receive additional bonus payments in the form of incremental hourly wage increases,
14 where Plan was exceeded by certain incremental amounts up to a pre-determined cap.
15 (Exhibit A-1.)

16 7. For purposes of determining whether a store met Plan requirements,
17 Defendant measured collective sales in the store on a monthly basis. (Exhibit A-1,2.)

18 8. According to the Complaint, “sales” under the Incentive Programs were
19 calculated to be net of any customer catalog merchandise returns to the store.
20 (Complaint, ¶ 11.)

21 9. No where in Plaintiff’s Complaint does she allege that she ever worked for
22 Defendant in a non-management capacity or that she, at any time, was covered by or
23 suffered damages under the non-management Store Team Incentive Program.
24 (Complaint).

25 **III. ARGUMENT**

26 **A. Applicable Legal Standard.**

27 When reviewing a complaint under a Rule 12(b)(6) motion to dismiss, courts
28 accept as true all material allegations in the complaint. *Cahill v. Liberty Mutual Ins.*

Co., 80 F.3d 336, 338 (9th Cir. 1996). However, a court “need not accept unreasonable inferences, unwarranted deductions of fact, or conclusory allegations cast in the form of factual allegations.” *Western Mining v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). Where the Complaint expressly puts a written document at issue, it is proper for the Court to treat such document as incorporated by reference, even if Plaintiff fails to attach such document. *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (applying the incorporation by reference doctrine to Complaint); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999) (holding “that it was proper to consider the SEC filings under the incorporation by reference doctrine”). When it appears that “the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,” a court should dismiss the claims. *Plevy v. Haggerty*, 38 F.Supp.2d 816, 820 (C.D. Cal. 1998); *Gompper v. VISX, Inc.*, 298 F.3d 893, 897 (9th Cir. 2002) (leave to amend need not be granted if to do so would be a “futile” exercise) (citing *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998)); *Kahle v. Gonzales*, 487 F.3d 697, 699 (9th Cir. 2007) (affirming motion to dismiss); *Alaska Elec. Pension Fund v. Adecco S.A.*, 371 F. Supp. 2d 1203, 1209-10 (S.D. Cal. 2005) (motion to dismiss granted).

B. Plaintiff’s Section 221 Claim Fails Because (1) Plaintiff’s Expectations of any Incentive Pay Derived Exclusively Under the Plan, and (2) The Plan Does Not Promise A Specified Payment Based upon Plaintiff’s Individual Sales.

1. Plaintiff Concedes that Her Expectations of Supplementary Payments Under the Store Management Incentive Plan Derived Exclusively from the Terms of The Incentive Plan Itself.

Labor Code Section 221, provides that, except for deductions expressly authorized by state or federal law, an employer may not “collect or receive from an employee any part of wages theretofore paid by said employer to said employee.” Cal. Labor Code §221. The California Supreme Court has recently explained that an

1 employee's "wages" for this purpose "are the amount the employer *has offered or*
2 *promised to pay, or has paid pursuant to such an offer or promise*, as compensation for
3 that employee's labor." *Prachasaisordej v. Ralphs Grocery Co., Inc.*, 42 Cal. 4th 217,
4 228 (2007) (emphasis in original). "The employer takes a 'deduction' or 'contribution'
5 from the employee's 'wages' or 'earnings' when it subtracts, withholds, sets off, or
6 requires the employee to return, a portion of the *compensation* offered, promised, or
7 paid as offered or promised, so that the employee, having performed the labor, actually
8 receives or retains less than the *paid, offered or promised compensation*, and effectively
9 makes a forced 'contribution' of the difference." *Id.* (emphasis in original). The
10 Supreme Court explained that "[b]y its inherent nature, [an incentive] plan does not
11 promise, or even create, incentive compensation unless and until" the terms of the plan
12 are met. *Ralphs Grocery*, 42 Cal. 4th at 238 n.11. The California Supreme Court held
13 that Ralph's incentive plan in which a "stated and expected wage was subject to an
14 unanticipated contribution, deduction, withholding, and/or reimbursement to the
15 employer for expenses beyond the employee's control" did not violate Section 221. *Id.*,
16 at 224, 227.

17 In *Ralphs*, employees of defendant Ralphs grocery stores were eligible for
18 supplementary compensation, in addition to their regular wages, if actual profits at their
19 own store exceeded preset profitability targets. *Id.* at 222. "For both target and actual
20 purposes, profits were determined by subtracting store operating expenses from store
21 revenues." *Id.* In calculating a store's profits, the employer, Ralphs, subtracted
22 ordinary business expenses such as cash and merchandise losses, workers'
23 compensation costs at that store, as well as overhead costs. *Id.* at 223-24. By the
24 incentive plan's own terms, only if the store was profitable based on the employer's
25 predetermined formula, would employees be entitled to supplemental compensation
26 under the incentive plan. *Id.* at 229.

27 In *Ralph's*, like here, the plaintiff was paid in full the compensation offered and
28 promised for the actual labor performed by him. *Id.* at 228. The Supreme Court found

1 that the compensation offered and promised for the actual labor performed by the
 2 plaintiff was the only agreed upon and guaranteed “wage” the plaintiff was individually
 3 entitled for the hours he worked, and that his “wage” “did not vary with the store’s
 4 financial fortunes, and from which no unauthorized amounts were deducted, withheld,
 5 set off, or otherwise received or collected back by the employer.” *Id.* There were no
 6 unlawful deductions from the plaintiff’s promised wage. *Id.* As the Supreme Court
 7 explained:

8 employees suffered neither a prohibited recapture of
 9 compensation already offered, promised, or paid, nor an
 10 uncertain or unanticipated deduction from expected wages.
 11 And because they attained no interest or entitlement in any
 12 supplementary compensation other than that finally calculated
 under the Plan, they made no forced “contribution,” direct or
 indirect, from their own resources to reimburse Ralphs for
 costs the law requires the employer to bear alone.

13 *Id.*

14 The Court emphasized that Ralphs’s “[e]mployees’ expectations with respect to
 15 [the] supplementary payments – i.e., what Ralphs offered or promised to pay – derived
 16 exclusively from the terms of the Plan itself.” *Id.*, at 229. The individual store
 17 employee’s entitlement to an incentive compensation payment, and the amount of such
 18 payment, dependent on “(1) whether the store’s overall operations for the period had
 19 been profitable, as the Plan defined profitability, and (2) how any such profit compared
 20 to goals or targets previously set by the store.” *Id.* The Court further explained that, by
 21 the Plan’s own terms, “it was *only after the* store had completed the relevant period of
 22 operation, and the resulting profit or loss figure was then derived, that it was possible to
 23 determine, by a further comparison to the present targets, whether Plan participants
 24 were entitled to a supplementary incentive compensation payment, and if so, how much.
 25 This final figure, and this figure only, once calculated, was the amount offered or
 26 promised as compensation for labor performed by eligible employees, and *it thus*
represented their supplemental ‘wages’ or ‘earnings.’” *Id.* (emphasis is original).

27 The Supreme Court’s rationale in *Ralphs* is dispositive here and mandates a
 28 dismissal of Plaintiff’s Section 221 claim. Plaintiff Scherer fails to allege, because she

1 cannot, that a “supplemental wage, gross or not, was ever promised except a wage based
2 and calculated, in the first instance, on the store’s Plan-defined profit, if any.” *Ralphs*
3 *Grocery*, 42 Cal. 4th at 238 n.11; *see generally* Complaint. Indeed, Plaintiff concedes
4 that she was only entitled to supplemental “wages” under the Incentive Plans, if her
5 store met certain preset criteria as expressed in the written program document.
6 (Complaint, ¶ 9; Exhibit A, SOP Incentive Programs at A-1, 2). According to the
7 Complaint, Defendant’s employees were eligible to receive supplemental compensation
8 (in addition to their guaranteed wages) if the monthly “dollar value of sales generated at
9 each” store location exceeded the Plan amount set by Defendant. (Complaint, ¶ 9).
10 Like under *Ralphs*, however, Defendant has a right to determine the terms of its own
11 supplemental incentive bonus program, including deciding whether, as alleged in the
12 Complaint, sales generated under the program were calculated as net of catalog returns.
13 (Complaint, ¶ 11).

14 Like the incentive compensation plan at issue in *Ralphs*, the supplemental
15 compensation under Eddie Bauer’s Incentive Plans was not guaranteed and was only
16 deemed payable if the pre-set criteria were met. *Id.* at A-1, 2. Eddie Bauer’s
17 management employees would be entitled to supplemental compensation *only if* that
18 employee’s store qualified under the terms of the Incentive Plans. *Id.*; Complaint, at
19 ¶¶ 9,10. Accordingly, like the employees in *Ralphs*, Defendant’s employees attained
20 no interest or entitlement in any supplementary compensation other than that finally
21 calculated under the terms of any applicable incentive program.

22 Significantly, Plaintiff does not allege, because she cannot, that she was denied
23 her guaranteed hourly wage, regardless of store sales, performance and profitability.
24 *See generally* Complaint. Like the plaintiff in *Ralphs*, Plaintiff Scherer’s hourly wage
25 was the only promised and expected compensation for the labor she performed.
26 Plaintiff fails to allege, because she cannot, that any unlawful deductions were made to
27 her guaranteed hourly wage. *Ralphs Grocery*, 42 Cal. 4th at 223. Without such an
28 allegation, Plaintiff’s Section 221 claim fails as a matter of law.

1 **2. Eddie Bauer's Incentive Plan Does Not Offer or Promise a**
 2 **Specified Bonus or Commission that Was Based upon Plaintiff's**
 3 **Individual Sales or Managerial Efforts.**

4 In reaching its decision, the Court in *Ralphs* focused particular attention on the
 5 fact that Ralphs employees did not earn supplemental compensation based solely on
 6 their *individual* sales efforts. *Id.* at 236.² Rather, the supplemental payments rewarded
 7 employees for the work performed by the collective efforts of all employees in the store.
 8 *Id.* "To encourage and reward [employee] participation, the Plan offered them, over and
 9 above their regular wages, a proportionate stake in the successful result." *Id.* An
 10 incentive plan "designed to reward employees beyond their normal pay for their
 11 collective contribution to store profits" did not violate section 221. *Id.* at 244. Because
 12 the supplemental incentive compensation was not individual in nature, it was not a
 13 "commission." *Id.* at 236.

14 Here, Plaintiff also fails to allege that she was "offered or promised a specified
 15 bonus or commission that was based upon and immediately measurable by . . . her
 16 individual sales or managerial efforts, but was then subject to deductions to cover
 17 employer costs." *Ralphs Grocery*, 42 Cal. 4th at 236; *see generally* Complaint. That is
 18 because no such offer or promise was made. *See* Exhibit A-1, 2. Eddie Bauer's
 19 incentive compensation was based on *total* store earnings arising from the collective
 20 efforts of all store employees, and not based on Plaintiff's individual efforts. As the
 21 Court stated in *Ralphs*, an incentive plan "designed to reward employees beyond their
 22 normal pay for their collective contribution to store profits" does not violate section
 23
 24

25 ² The Supreme Court in *Ralphs* expressly distinguished prior case law (e.g., *Kerr's Catering*
 26 *Service v. Dept. of Industrial Relations*, 57 Cal.2d 319 (1962), *Quillian v. Lion Oil Co.*, 96 Cal. App. 3d
 27 156 (1979) and *Hudgins v. Nieman Marcus Group, Inc.*, 34 Cal. App. 4th 1109 (1995)) pertaining to
 28 individual-based sales commissions because in those prior cases the employees were "offered or
 promised a specified bonus or commission that was based upon, and immediately measurable by, his or
 her individual sales or managerial efforts, but was then subject to deductions to cover employer costs."
Ralphs Groceries, at 236.

221. *Ralphs Grocery*, 42 Cal. 4th at 244. Thus, based on the facts alleged in the Complaint, Plaintiff's Section 221 claim fails as a matter of law.

C. Plaintiff Lacks Standing To Seek Relief For *Non-Management* Employees Who Were Eligible For Supplemental Compensation Under Defendant's Store *Team* Performance Plan Because she was Never a Member of that Purported Class.

It is black-letter law that a plaintiff "cannot give himself standing to sue by purporting to represent a class of which he is not a member." *Parker v. Bowron*, 40 Cal.2d 344, 353 (1953); *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 462 (9th Cir. 1973) (plaintiff "cannot represent those having causes of action against other defendants against whom the plaintiff has no cause of action"); *Payne v. United California Bank*, 23 Cal. App.3d 850, 859-60 (1972) ("Plaintiffs cannot give themselves standing to sue by purporting to represent a class of which they are not a member."); *Blackwell v. SkyWest Airlines, Inc.*, 245 F.R.D. 453, 462 (S.D. Cal. 2007) (where plaintiff lacked standing to raise claim for unlawful wage statement, she could not represent class of employees who did have standing).

Here, Plaintiff Scherer fails to assert that the Team Incentive Plan was ever applied to her personally or that she ever worked for Defendant in a non-management capacity. (Complaint generally and ¶20). The Team Incentive Plan provided potential supplemental compensation *only* for non-management employees; managerial employees were part of a separate plan. (Exhibit A). Plaintiff fails to allege, because she cannot, that she suffered damages related to any allegedly improper application of the Team Incentive Plan, or is likely to suffer damages, as a result of any violation of law with regard to the Team Incentive Plan. Under these circumstances, Plaintiff lacks standing, as a matter of law, to assert any claims on behalf of non-management employees under the Team Incentive Plan.

**D. Plaintiff's Claim Under California Business And Professions Code
Section 17200 Predicated On The Alleged Violation Of Section
221 Fails As A Matter Of Law.**


"In the absence of a valid claim for violation of the prevailing wages law, plaintiffs also cannot successfully allege unfair business practices or unfair competition under the Business and Professions Code." *Violante v. Communities Southwest Development and Const. Co.*, 138 Cal.App.4th 972, 980 (2006). Here, as described above, Plaintiff's Section 221 claim fails as a matter of law. *See* Section III(B) and (C), *supra*. Without a valid Section 221 claim upon which Plaintiff's 17200 is predicated, Plaintiff's Section 17200 claim must also fail.

IV. CONCLUSION

As explained above, Plaintiff's First Causes of Action for an alleged violation of Labor Code Section 221 arising out of the purported unlawful collection or receipt of wages paid to Plaintiff pursuant to Eddie Bauer's Incentive Plan, and Fourth Cause of Action for alleged violations of Business and Professions Code § 17200, fail to state a claim upon which relief can be granted. Accordingly, Defendant's Motion to Dismiss should be granted.

Dated: December 10, 2007

AKIN GUMP STRAUSS HAUER & FELD LLP

By  _____
Kalia C. Petmecky
Attorneys for Defendant
EDDIE BAUER, INC.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 2400, Los Angeles, California 90067. On December 10, 2007, I electronically filed the foregoing **DEFENDANT EDDIE BAUER, INC.'S NOTICE OF MOTION AND PARTIAL MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)** with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Sheldon A. Ostroff, APC sostrofflaw@aol.com

and I hereby certify that I have mailed by the United States Postal Service a courtesy copy of the same to the following non-ECF participants(s):

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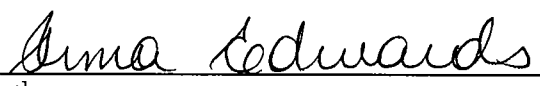
Attorneys for Kristal D. Scherer

☒ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on December 10, 2007 at Los Angeles, California.

Irma Edwards

[Print Name of Person Executing Proof]


[Signature]